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06 DEC 2006

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In re Application of	:	
KEIM et al.	:	DECISION
Application No.: 10/531,159	:	
PCT No.: PCT/US03/32887	:	
Int. Filing Date: 14 October 2003	:	
Priority Date: 11 October 2002	:	
Attorney's Docket No.: 112624.00029	:	
For: MOLECULAR SIGNATURE AND ASSAY	:	
FOR FLUOROQUINOLINE RESISTANCE IN	:	
BACILLUS ANTHRACIS	:	

This decision is in response to applicants' renewed petition under 37 CFR 1.10(d) filed on 21 August 2006. The renewed petition states that "Applicants maintain that the USPTO has not properly considered all evidence, and seek to invoke the supervisory authority of the Office of the Director to reconsider the relevant facts in support of its position." This statement has been construed as a request for supervisory review.

## BACKGROUND

On 14 October 2003, applicants filed international application PCT/US03/32887, which designated the U.S. and claimed a priority date of 11 October 2002. A copy of the international application was communicated to the USPTO from the International Bureau on 02 December 2004. The thirty-month period for paying the basic national fee in the United States expired at midnight on 11 April 2005 (29 January 2005 being a Saturday).

On 12 April 2005, applicants filed a submission for entry into the national stage in the United States which was accompanied by, *inter alia*, the U.S. Basic National Fee.

On 09 June 2005, applicants filed a petition under 37 CFR 1.10(d) requesting that the papers filed in the submission for entry into the national stage be accorded a date of 11 April 2005 rather than 12 April 2005.

On 27 September 2005, a decision was mailed dismissing applicants' petition under 37 CFR 1.10(d) because applicant had failed to provide a showing, corroborated by evidence from

the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS provide evidence from the USPS, which established to the satisfaction of the Commissioner that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day.

On 19 October 2005, the United States Designated/Elected Office (DO/EO/US) mailed a NOTIFICATION OF ABANDONMENT (Form PCT/DO/EO/909) indicating that the application was abandoned as to the United States of America as per the decision mailed 27 September 2005.

On 03 March 2006, applicants filed a renewed petition under 37 CFR 1.10(d).

On 21 June 2006, a decision was mailed dismissing applicants' renewed petition under 37CFR 1.10(d) because applicant had failed to provide a showing, corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS provide evidence from the USPS, which established to the satisfaction of the Commissioner that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day.

On 21 August 2006, applicant submitted the instant renewed petition under 37 CFR 1.10(d). As noted above, applicants' request that the Office of the Director invoke its supervisory authority under 37 CFR 1.181 has been construed as a request for supervisory review.

### **DISCUSSION**

A review of the application papers located in the application file reveals that they were stamped with a receipt date of 12 April 2005. The "Express Mail" label number EV667329735US is shown on the Transmittal Letter which itemizes the items being filed. The copy of the Customer Copy of the "Express Mail Post Office to Addressee" mailing label mailing label accompanying the petition contains the same "Express Mail" label number. The copy of the Customer Copy of Express Mail mailing label #EV535680024US shows a "Date In" of "041205".

37 CFR 1.10(d) states:

(d) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

As noted in the decision mailed 27 September 2005, a satisfactory showing has been made under 37 CFR 1.10(d)(1) and (2).

The decision mailed 27 September 2005 indicated that item (3) had not been satisfied. In regard to the letter from Melanie Thomas of the United States Postal Service (USPS), that decision stated.

Petitioner has not provided sufficient evidence from the USPS, as required under the rule. Specifically, Ms. Thomas fails to set forth the factual basis upon which her conclusion is based. If her conclusion was based on evidence provided to her by the law firm, then such would not constitute corroborating evidence.

The decision also acknowledged the affidavits of Robert D. Atkins, William Bilyk, Maritza O'Neill, and John Mitchell. The decision, however, failed to address the courier log provided by applicants.

The decision mailed 21 June 2006 also indicated that item (3) had not been satisfied. That decision repeated the statement above regarding the letter from Melanie Thomas of the USPS. That decision also addressed the courier log. It stated:

As to the courier log, it appears to be intended to satisfy what MPEP § 513 indicates is an adequate showing of the date of deposit under 37 CFR 1.10(d)(3). The relevant portion of MPEP § 513 states:

... a notation in a log book, entered after deposit by the person who deposited the correspondence as "Express Mail" within one business day of such deposit, setting forth *the items indicated above*, would be deemed on petition to be an adequate showing of the date of deposit under 37 CFR 1.10(d)(3). (emphasis added)

The "items indicated above" are

... a log book which contains information such as the "Express Mail" number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature;

and the date and time of entry in the log.

The document provided by applicant includes the date and time of deposit. However, it does not appear to include any of the other information. In particular, it does not include the "Express Mail" mail number, any file identification number, or the date and time of entry in the log. Without the "Express Mail" mail number and file identification number, it is not clear how one is to reliably identify the package at issue. Without the date and time of entry in the log, it is not clear if the log came into being within one business day after deposit.

The petition filed 21 August 2006 has been construed as requesting supervisory review of the decisions mailed 27 September 2005 and 21 June 2006.

Applicants state that the "affidavits of Maritza O'Neill and William Bilyk confirm that Express Mail EV667329735US containing the national stage patent application was placed in the Intelliquick courier pick-up bin by about 4:30 p.m. on April 11, 2005, see Exhibit D. These affidavits were made under oath and penalty of perjury and should be accepted as accurate and reliable statements." The affidavit of Maritza O'Neill refers specifically to Express Mail mailing label number EV667329735US. However, the affidavit was made six weeks after the date in question. There is nothing in the affidavit that suggests that Maritza O'Neill had any specific remembrance or recollection of that particular package. The affidavit appears to rely on the fact that the Certificate of Mailing was signed on that date by her. However, this Certificate of Mailing only establishes intent to mail it on that date, not that it was actually mailed on that date. The affidavit of William Bilyk merely states that on April 11, 2005 and April 12, 2005, all packages in his custody were picked up by John Mitchell between 6:00 and 6:30 p.m. Neither the affidavit of William Bilyk nor the affidavit of John Mitchell specifically refer to Express Mail mailing label number EV667329735US. Rather, these affidavits simply confirm that each of these persons performed their usual duties on April 11, 2005 and April 12, 2005.

The affidavit of Robert D. Atkins states that he reviewed and signed the transmittal documents and personally transferred custody of the documents to Maritza O'Neill on 11 April 2005. However, this does not establish that the documents were mailed by Express Mail on that date. Moreover, as with the affidavit of Maritza O'Neill, the affidavit was made six weeks after the date in question and appears to be based on the date of signing rather than any specific remembrance or recollection of that particular package.

Applicants also urge that the courier log is an independent and contemporaneous record, made within one business day of the deposit in question, that the Express Mail was in fact taken to the U.S. Post Office at the indicated time. However, the log does not contain any Express Mail numbers. One simply cannot determine from the log that the correspondence having Express Mail mailing label number EV667329735US was even entered in the log. Moreover, it is not clear that the courier log was made within one business day of the deposit in question. The affidavit of John Mitchell states that he "maintains a daily manifest of all pickups and deliveries,



including times and locations” but doesn’t say when the entries in the log are made. The log does not seem to be in chronological order. For example, on page 1 of the courier log for 11 April 2005, the last three entries have pickup times of 12:17, 11:35, and 12:51. Since the log is not in chronological order, it raises questions as to when the entries were made. If the entries were made before the actual pickup or the actual delivery, then it does not satisfy 37 CFR 1.10(d)(3).

Applicants also urge that the fact that the USPS records show Express Mail mailing label number EV667329735US in its possession as of 5:05 p.m. on 12 April 2005 in combination with the log establishes that Express Mail mailing label number EV667329735US was deposited with the USPS on 11 April 2005. However, as noted above, the log is not a reliable record of whether a particular Express Mail mailing label number was picked up or deposited with the USPS on any particular date.

Applicants also urge that the letter from Melanie Thomas of the USPS satisfies 37 CFR 1.10(b)(3). The petition suggests that the letter from Melanie Thomas was based on the same evidence presented in the petition under 37 CFR 1.10(d). The petition states that “the U.S. Post Office understood and accepted the evidence and acknowledged the mistake. For the USPTO to discount an official statement from the U.S. Post Office out-of-hand is improper.” However, for the reasons set forth above, the evidence is not sufficient. Thus, any conclusion based on that evidence is not reliable.

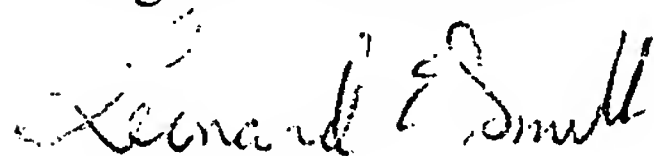
### **CONCLUSION**

For the reasons set forth above, applicant’s renewed petition under 37 CFR 1.10(d) is **DISMISSED** without prejudice.

If reconsideration on the merits of this petition is desired, a proper reply must be filed within TWO (2) MONTHS from the mail date of this decision. Any reconsideration request should include a cover letter entitled “Renewed Petition Under 37 CFR 1.10(d).” No additional petition fee is required.

Applicant may wish to consider filing a petition to the Commissioner under 37 CFR 1.137(b) requesting that the application be revived.

Please direct further correspondence with respect to this matter to Mail Stop PCT, Commissioner for Patents, Office of PCT Legal Administration, P.O. Box 1450, Alexandria, Virginia 22313-1450, with the contents of the letter marked to the attention of the Office of PCT Legal Administration.



Leonard Smith  
Supervisory Legal Examiner

Application No.: 10/531,159

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